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April 25, 2002

The Honorable Olympia J. Snowe
United States Senate
154 Russell Senate Office Building
Washington DC 20510-1903

The Honorable Susan M. Collins
United States Senate
172 Russell Senate Office Building
Washington DC 20510-1904

Re: H.R. 3005 -- Threat to State and Local Regulatory Programs

Dear Senators Snowe and Collins:

I recently joined my colleagues at the National Association of Attorneys General in passing the attached resolution expressing concern over the inclusion of provisions in international trade agreements, by which foreign investors are granted new rights to challenge and seek compensation for state, local and federal government regulatory actions. Similar provisions may proliferate in future trade agreements enacted under H.R. 3005, the "fast track" trade legislation now pending before Congress, unless the bill is amended to ensure that foreign investors receive no greater rights than those afforded U.S. citizens under our Constitution.

Please know that this issue has no bearing on the promotion of international trade. However, the potential in H.R. 3005, as currently written, to create an expansive new international law of takings, having no derivation in our Constitution, is contrary to our Constitution's principles as well as to promotion of even-handed trade.

My concerns arise from real experiences encountered by state and local governments with similar investor-protection provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA). These provisions have raised serious problems with the ability of state and local governments to take constitutional actions to protect public welfare and the environment.

These provisions compensate disappointed investors from other countries under a vague standard that is potentially much more expansive than that available for domestic investors who claim a regulatory taking in our courts. In effect, these provisions may require government to pay foreign investors for the right to enforce its environmental regulations.

Under these provisions, compensation is provided not by courts versed in constitutional law but by arbitration panels that meet in secret and are not bound by precedent. These decisions are virtually nonappealable on the merits.

By way of example, under parallel provisions of NAFTA, a foreign corporation has laid claim to a billion dollars in damages arising out of the State of California's ban on MBTE in gasoline that was enacted to protect groundwater. Such claims clearly undermine the ability of state and local government to protect the environment.

Joining NAAG in expressing concerns with these provisions are the National League of Cities, U.S. Conference of Mayors, National Conference of State Legislators and National Association of Counties.

As currently written, H.R. 3005 broadly authorizes U.S. trade negotiations to extend these provisions to all future trade agreements with other nations. Experience with NAFTA demonstrates how significantly such provisions in international trade agreements can depart from American constitutional standards.

In sum, the investor-protection provisions in H.R. 3005 provide substantially greater rights to foreign investors than American ones. They potentially go far beyond the carefully fashioned rules for compensation under the Fifth and Fourteenth Amendments, as articulated by our courts and implemented by judges who reach their decisions publicly, are bound by applicable precedent, and whose decisions are subject to appellate review.

Please consider supporting amendments to H.R. 3005 that insure that foreign investors receive no greater rights than provided under the U.S. Constitution when they seek compensation for regulatory takings. Thank you.

Sincerely,



G. Steven Rowe
Attorney General

GSR/tt

Enclosure